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No. 80-1600

In the Supreme Court of the United States

October Term, 1980

JAMES H. HOLMES,
Petitioner,

vs.

UNION GOSPEL PRESS,
STATE OF OHIO,
and
OHIO BUREAU OF EMPLOYMENT SERVICES,
Respondents.

ON THE PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF FOR THE RESPONDENT, UNION GOSPEL PRESS, IN OPPOSITION

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STATEMENT OF THE CASE

Respondent, Union Gospel Press, accepts the Statement of Facts appearing in the Petition for Writ of Certiorari as substantially correct except as specifically hereinafter distinguished. These are items that have either been not stated or misstated.

I. Petitioner's claim for benefits was disallowed because the Respondent Union Gospel Press had not elected to be covered by the Ohio unemployment insurance laws.

This fact raises a basic question of standing in that no property right thus existed. The nature of the Union Gospel Press is that it is an affiliate of a church organization, The Incorporated Trustees of the Gospel Worker Society, a non-profit corporation performing missionary services. As a non-profit religious association, employees such as Petitioner herein are not eligible for unemployment benefits unless the employer elected coverage, which was *not* the case herein. Thus there is not a legitimate claim of entitlement.

II. Petitioner states that after he made application for unemployment benefits with the Ohio Bureau of Employment Services, he went to the local office of said agency after a period of time to inquire as to the status of his benefits. In actuality, there was one step prior to this not mentioned. Petitioner was separated from employment with Respondent on February 17, 1978, and soon thereafter he did file a claim for unemployment compensation benefits. In response to this initial filing *the Bureau mailed and Petitioner received* on March 29, 1978, a "Determination of Application for Benefit Rights" informing him that his claim for benefits was being disallowed because the employer, a religious charitable organization, had not elected coverage. This mailing was via regular mail service pursuant to statute. Petitioner *received* this notice at his residence which remained the same throughout this entire matter, and responded by requesting "Reconsideration." It is from this decision mailed by the Bureau of Employment Services on April 14, 1978, that Petitioner failed to timely appeal pursuant to Ohio Revised Code § 4141.28 (H). In reference to this, there is a dispute as to whether Petitioner received that notice of denial as was raised at the Referee's Hearing of the Ohio Bureau of Employment Services (Petitioner's App. G-1-5).

III. Petitioner failed to raise any constitutional issue, or even hint at same at the Referee's Hearing conducted on May 31, 1978 (Referee Boris Rakowsky, Unemployment Compensation Board of Review), and at every administrative appeal thereafter. The first instance wherein a constitutional issue (due process) was raised was at the Medina Common Pleas Court Appeal which was not an appeal de novo (O.R.C. § 4141.28).

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner seeks this Court's review based on two (2) constitutional questions, due process and fair hearing. These questions were not, however, raised properly below and therefore, are not properly before this Court. Responding to Petitioner's reasons in the order presented it becomes clear that the Writ should be denied.

I. Due Process

Petitioner fails to demonstrate a denial of due process of law occurred in violation of 42 U.S.C. 503 (2) (3). Petitioner attacks the Ohio Supreme Court's reliance on the United States Supreme Court's decision in *Mullane v. Central Hanover Bank and Trust Co.* (1950), 339 U.S. 306, 94 L. Ed. 2d 865. The Court in *Mullane* articulated the precise test of determining the constitutionality of a notice mechanism wherein it held, at page 314, that a method for providing notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* further went on to add at page 318 that notification "by ordinary mail to the record addresses" comports with due process requirements.

The notice mechanism provided for in O.R.C. § 4141.28 (H) is pursuant to the *Mullane* test, reasonably calculated to give interested parties notice of a pending action. The Ohio Supreme Court endorsed this test in the instant case and also in a similar recently decided case, *In re Foreclosure of Liens* (1980), 62 Ohio St. 2d 333, also involving the constitutionality of an ordinary mail service status, O.R.C. § 5721.18 (B) (dealing with a foreclosure action).

The United States Supreme Court has affirmed and followed the *Mullane* decision in many instances since 1950. The within case is not unique in any manner and therefore, is a bad vehicle for alleged constitutional violations.

One important factor to reiterate is that contrary to Petitioner's statement of facts, it is *not* without doubt as to whether Petitioner ever received the decision which gave right to an appeal. On the contrary, this was clearly in question as was raised and noted at the initial Referee Hearing before the Bureau of Unemployment Services. All factors presented indicated that Petitioner did, in fact, receive the notice. He had received the original "Determination of Application for Benefit Rights" by regular mail service and appealed timely therefrom and the record reflected that on April 14, 1978, the Medina Post Office had deposited the Reconsideration Decision in the United States Depository. Petitioner raises the "fortuitous encounter" theory of discovering that a notice was mailed. Respondent submits that it would raise havoc with the State system of notice if anyone could declare a violation of due process by merely stating non-receipt in the face of all other factors indicating proper service. Therefore, an "irrebuttable presumption" of service thus protects the integrity of the State's notice system by preventing mere allegations of non-receipt from interfering with the orderly flow of the administrative bureaucracy.

II. Fair Hearing

Petitioner fails to demonstrate that the procedure involved in the instant case is unfair as prescribed by 42 U.S.C. 503 (2) (3). Petitioner states that in order for a fair hearing to be conducted it must provide for the opportunity to rebut the presumption of notice, contra to the holding of the Ohio Supreme Court in this case and followed in *In re Foreclosure of Liens.*

The right to appeal in unemployment compensation proceedings is statutory and the time-limit provision of O.R.C. § 4141.28 is mandatory. *See Todd v. Garnes* (1975), 44 Ohio St. 2d 56, 57 wherein it was held that "compliance with these specific and mandatory requirements governing the filing of such notice is essential to invoke jurisdiction . . . ."

O.R.C. § 4141.28 is precise in its interpretation and plain meaning, fourteen (14) days from mailing! This is jurisdictional and failure to comply precludes the right to appeal. Petitioner is attempting to create a rebuttable presumption on receipt of service. That is clearly not the case herein, and this service requirement as noted before does comport with due process. The Ohio statute clearly conforms to all constitutional requirements of a fair hearing and Petitioner's only obligation to avail himself of same was to timely appeal.

Petitioner's claim of violation of constitutional fairness is unfounded and should not be reviewed by this court.

III. Waiver of Constitutional Rights for Failure to Properly Raise Below

Petitioner's Writ of Certiorari to the Ohio Supreme Court based on alleged violations of Due Process and Fairness should not be granted for hearing because of a failure to properly raise these constitutional issues below.

Petitioner failed to raise these constitutional issues at the trier-of-fact level (Board of Review, Ohio Bureau of Employment Services) and at the Medina County Court of Common Pleas in his Notice of Appeal. This basic question of standing has been reviewed by the Ohio Supreme Court (*State v. Davis* (1964), 1 Ohio St. 2d 28; *State v. Childs* (1968), 14 Ohio St. 2d 56, *cert. denied* 394 U.S. 1002; and *Stacy v. Van Coren* (1969), 18 Ohio St. 2d 188) and by the United States Supreme Court in *Yakus v. United States*, 321 U.S. 414. The record is devoid of a federal constitutional question, thus this Court should deny the Writ.

IV. Supreme Court of Ohio—Court of Last Resort

Petitioner's Writ of Certiorari should be denied because the Court of last resort, the Ohio Supreme Court, gave Petitioner a full opportunity to be heard on his questions of timeliness of appeal and its constitutionality. This matter involved the interpretation of a State of Ohio statute and by endorsing said statute as comporting with standards of due process on both the state level and federal (*Mullane* decision) level this Court should not interfere with such holdings by rehearing the same issues previously dealt with in *Mullane*. Therefore, this Court should decline to hear this case.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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